(12) (18)

Nos. 90-29, 90-38

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES C. PLEDGER .... *Petitioner*

vs.

DANIEL L. MEDLOCK, ET. AL. .... *Respondents*

AND

DANIEL L. MEDLOCK, ET. AL. .... *Petitioners*

vs.

JAMES C. PLEDGER .... *Petitioner*

CONSOLIDATED CASES

ON WRIT OF CERTIORARI TO
THE ARKANSAS SUPREME COURT

BRIEF ON THE MERITS FOR APPELLEE IN DOCKET NO. 90-38

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SUMMARY OF ARGUMENT

The Appellants have stated that a conflict exists between the decision of the Supreme Court of Arkansas in this case and decisions of other state and federal appellate courts regarding the First Amendment standards to be applied to cable television, and that the decision of the Arkansas court is erroneous. This conclusion is based upon a very broad reading of cases issued by this Court and by other federal case decisions. Arkansas' differing sales tax treatment of the print

and cable media is justified by important or substantial interests, not the least of which are increasing revenues for the education of Arkansas' children and to meet the needs of the state's citizenry. Further, the fact that Arkansas has no compensating use tax upon the service of descrambling satellite television signals is also not helpful to Appellants' First Amendment position because the compensating tax statutes do not apply to any services.

The Appellants have also alleged that Act 769 of 1989 violates their rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. This legislation, when viewed under the "rational basis" test, survives this constitutional challenge. Therefore, there is adequate delineation of the First Amendment rights of cable television, and this Court should affirm the decision of the Supreme Court of Arkansas with regard to Act 769 of 1989.

ARGUMENT

THE STATE OF ARKANSAS IS NOT UNCONSTITUTIONALLY IMPOSING ITS SALES TAXES UPON THE PURCHASES AND SALES OF CABLE TELEVISION SERVICES.

I.

First Amendment Considerations

The Appellants have stated that there is a real conflict between the Supreme Court of Arkansas' application of the First Amendment test enunciated by this Court in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenues*, 460 U.S. 575, 75 L.Ed.2d 295, 103 S.Ct. 1365 (1983) and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 95 L.Ed.2d 209, 107 S.Ct. 1722 (1987), and similar decisions by other state and federal appellate courts. In *Minneapolis Star*, this Court repeatedly emphasized that the case dealt with the press, and struck down the tax at issue there because it singled out the press, and because it targeted a small group of newspapers. This Court stated:

> "When the state singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." (75 L.Ed.2d at 304-305)

Similarly, in *Arkansas Writers' Project*, this Court held

that because the tax in question targeted only a small group "within the press" and, more repugnantly, was imposed on the basis of a publication's content, the tax must be declared invalid. Both of these cases, as well as *Louisiana Life, Ltd. v. McNamara*, 504 S.2d 900 (La. App. 1st Div., 1987), cited by Appellants at page 14 of their Petition, turned on the fact that a tax which "singles out the press" violates the right of freedom of the press guaranteed by the First Amendment. Cable television is not a part of the press which *Minneapolis Star*'s historical narrative emphasized as being worthy of the highest degree of protection. Cable television is entitled to a degree of free speech protection under the First Amendment, but it has not historically been accorded the heightened degree given to the press, the collective body of printed publications.

A. First Amendment Protection Afforded to Cable Television

This Court has found, and it is not disputed that the cable television industry is engaged in activities which "plainly implicate First Amendment interests." *City of Los Angeles v. Preferred Communications, Inc.*, 467 U.S. 488, 494 (1986). However, merely implicating First Amendment protection "does not end the inquiry" regarding the validity of a particular burden by a regulatory body. *Id.* at 495. The three concurring justices in *Preferred Communications*, supra, succinctly stated the task before this Court and the other courts of this country in dealing with the problems of First Amendment protection for burgeoning industries such as cable television when they stated:

> Different communications media are treated differently for First Amendment purposes. Compare, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984). In assessing First Amendment claims concerning cable access, the court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard, or whether those characteristics require new analysis.

But even before an analysis of the level of First Amendment protection due to cable television is examined, it is important for the Court to understand the nature of the Arkansas tax being challenged by the Appellants in this case.

B. Arkansas Gross Receipts Tax

Since 1941, Arkansas has imposed a Gross Receipts (Sales) tax on tangible personal property. The gross receipts for the sale of all tangible personal property are subject to the sales (or use) tax, unless specifically exempted. The same statutory scheme more recently has added several enumerated services that are subject to the sales tax. Although they have been described by the Appellants as certain clearly enumerated services, there are in fact a great multitude of services similarly situated to cable television which are not subject to the Arkansas sales tax. For example, rental and sales of video tapes are taxed as tangible property. Movie theatre tickets are taxed, as are theatre tickets, concert tickets, records, tapes, cassettes, etc. Since 1989, the gross receipts for descrambling satellite television are taxed. Each of these forms of media are in the business of disseminating primarily news and/or entertainment features to citizens for a subscription price or ticket price. There is no special tax, as was the case in *Minneapolis Star*, supra.

The Arkansas tax is imposed upon *gross receipts*. The

State of Arkansas does not tax speech nor does it tax dissemination of information. It is a business tax, pure and simple. It is a general tax, which is equally administered to all similarly situated businesses. There is no tax on wireless radio and television because there are no gross receipts for services which are susceptible to the taxation scheme.

The Arkansas sales tax does exempt sales of newspapers and magazines by subscription, because of the longstanding relationship, exhibited by lack of regulation, between government and the traditional press. However, neither magazines nor newspapers are similarly situated with cable television. Certainly it cannot be denied that there are similarities between the message carried by newspapers and the message carried by cable television in terms of news, entertainment, and the like. However, when access to that message is not an issue, courts generally have not held that identical regulatory applications must apply. *Quincy Cable T.V. v. F.C.C.*, 768 F.2d 1434 (D.C. Cir. 1985); *Times Mirror, Inc. v. City of Los Angeles*, 237 Cal. Rptr. 346 (1987). *Preferred Communications*, supra, involved access to the public. The instant case does not. Here, cable television services are fully available to all citizens living within the delivery areas within the State of Arkansas. Cable television is run as a business and it is being taxed as a part of a regulatory business scheme for the purpose of raising revenue for the State of Arkansas, and not for the purposes of limiting speech.

Even if it were established that cable television was entitled to the same degree of protection as the print media, the tax at issue in the present case withstands constitutional challenge. There is no "singling out" of cable television. Ark. Code Ann. § 26-52-301(3)(D)(i) (Supp. 1989), cited by Appellants at pages 24a and 25a of their Petition for

Certiorari, imposes sales tax on cable television service as a part of the state's general scheme of sales tax imposition. As previously stated, cable television is one of many services and products subject to the state's general tax levied upon the gross receipts derived from sales of those services and products. The same general sales tax is applied to sales of utilities services, books and magazines sold at retail, admissions to movie theaters, sales and rentals of videotaped movies and documentaries, and many other products and services. No special tax is involved; cable television is not "singled out"; and no group of cable service providers is targeted any differently than another. The tax applies evenly to all cable television service. Moreover, it is not even argued by Appellants that the infirmity so apparent in *Arkansas Writers' Project* is present in the case at bar. Content-based discrimination, which has been deemed so offensive to the First Amendment, is not an issue in the present case.

C. Distinctions Between the Media

This Court, in *Preferred Communications*, supra, suggested that the cable medium may be distinguishable from the newspaper medium and that more government regulation of the cable medium may be permissible, because cable requires use of public ways and installation of cable systems may disrupt public order. Appellants argue that use of the public right-of-way and disruption of public order is not a valid distinction between the print media and cable television. If the Arkansas sales tax on gross receipts was a limitation on expression, or if it was in the way content based or oriented, the Appellees would agree. However, the standards of differentiation with the press for purposes of limiting expression are completely different from the standards of differentiation for the purposes of distinguishing it for non-

speech regulation. *Quincy Cable T.V. v. F.C.C.*, supra. The vast majority of the cases that have appeared in the federal courts concerning cable television are on the issue of access. A sales tax on gross receipts generally applied to all similarly situated businesses does not limit access, nor is it entitled to the deference of First Amendment protection afforded to the press.

U.S. v. O'Brien, 391 U.S. 367, 20 L.Ed.2d 672 (1968), cited by Appellants at page 24 of their Brief on the Merits, clearly held that governmental regulation is justified under First Amendment review if:

(1) The regulation is within the constitutional power of the government;

(2) The regulation furthers an important or substantial interest;

(3) The regulation is unrelated to suppression of free expression; and

(4) Any incidental restriction of First Amendment freedoms is no greater than necessary to further the governmental interest.

(20 L.Ed.2d at 680)

The same standard was applied in *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N. D. Cal. 1987), and *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9 (D. C. Cir. 1977), two other cases cited by Appellants.

In *Group W Cable*, the district court stated "as this court had previously stated in *Preferred Communications*" the precise degree of First Amendment protection due cable

television is in doubt. In an *access case* there must be a material difference from the print media, otherwise the same level of protection would be due. However, the First Amendment does not preclude government regulation of a non-communication aspect of speech. In this case, the *O'Brien* case was applied, and the Court found that because there was an attempt to deny access, the same level of protection for the press would apply to cable television.

Does the sales tax on cable television service pass the *O'Brien* test? The answer is clearly yes. While cable television is similarly situated to many businesses within the classification for taxation of services, it is not similarly situated with other media because it has a very real impact upon public ways and is of a character completely dissimilar to the other media. In the instant case, the *O'Brien* test can be applied, and because no denial of access is required, the Court could legitimately uphold a distinction between the print media and cable television for regulatory purposes. An analysis of the four prongs of the *O'Brien* test discloses:

(1) The regulation must be within the constitutional powers of the government. There is no denial that a general sales tax on gross receipts of similarly situated services is well within the constitutional power of the State of Arkansas and its various cities and counties.

(2) The regulation must further an important or substantial interest. The raising of revenue for the State of Arkansas and its counties and cities has been found to be a critical interest of government, *Minneapolis Star*, supra. In the case of *Century Federal, Inc. v. City of Palo Alto*, 710 F.Supp. 1559 (N.D. Cal. 1988) a district court construed *Minneapolis Star* to mean that the raising of revenue was a

compelling state interest when accomplished by a general tax rather than a specific tax, as is the case at bar.

(3) The regulation must be unrelated to the suppression of free expression. The general tax on gross receipts is completely unrelated to the suppression of free expression. There is no content related aspect to this case whatsoever, nor is there any allegation of denial of access.

(4) An incidental restriction of First Amendment freedom must be no greater than necessary to the furtherance of the government interest. In this case, there is no incidental restriction of First Amendment freedom. The taxation of gross receipts of similarly situated businesses neither denies access nor is content based. Therefore, the government interest in raising revenue is greater than any incidental restriction of First Amendment rights and privileges.

Further discussion should be given to the second prong of the *O'Brien* test. The placement of cable television service within the general sales tax base goes no further than necessary to advance the "important or substantial interest" of raising revenue to provide for the education of Arkansas' children and to meet the needs of its citizens. The Supreme Court of Arkansas in this case determined that for tax purposes sales of "scrambled" satellite television broadcast subscription services and sales of cable television service should be treated similarly. Although this Appellee has challenged this finding (*Pledger v. Medlock, et al.*, Supreme Court of the United States, docket number 90-29), the General Assembly of the State of Arkansas chose to provide equal tax treatment of those services. This treatment is provided in Act 769 of 1989, which Appellants cite at pages 24a and 25a of their Petition for Certiorari (Appendix E). The

Emergency Clause of this Act states:

> "It is hereby found and determined by the General Assembly that the State of Arkansas is in serious need of additional revenue for the purpose of funding critical education programs and other essential services required by the citizens of the state and the provisions of this act are necessary to raise needed revenue. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect on and after July 1, 1989."

Appellants contend that the raising of revenue is not an interest which will satisfy the *O'Brien* test. Appellants' formula would require that a compelling interest be exhibited by the government. The showing of a compelling interest is not required in this case. *O'Brien* expressly states that a governmental regulation must further an "important or substantial interest." Appellants' chief authority, *Minneapolis Star*, recognized that raising of revenue is an "interest [which] is critical to any government." 460 U.S. at 586. Surely an interest which is "critical" meets the criterion of "important or substantial." The Court in *Minneapolis Star* acknowledged the importance of such interest; it simply determined that even such an important interest could not support a special tax on ink and paper which was levied against only one newspaper. Likewise, the Court in *Arkansas Writers' Project* stated:

> "The Commissioner . . . asserts the state's general interest in raising revenue. While we have recognized that this interest is an important one, . . . it does not explain selective imposition of the sales tax on some

magazines and not others, based solely on their content." (107 S.Ct. at 1722)

Again, in *Arkansas Writers' Project*, this Court found that when there was differentiation between the media *based on content*, a state must show a compelling interest for that different treatment. Granted, the raising of revenue can be seen as not being a compelling interest to justify a content-based discrimination. However, in the instant case, there is no content-based distinction. Further, there is no selective imposition of sales tax on some cable television systems and not others. Therefore, the recognized important interest of raising revenue is sufficient, and the *O'Brien* test is fully satisfied.

As stated by the Supreme Court of Arkansas in *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983), all legislative enactments are presumed to be constitutionally valid. The legislature has broad discretion in creating classifications for taxation purposes. *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986); *Times Mirror Co. v. City of Los Angeles*, supra. The court in the *Times Mirror* case also stated that a tax which is neither special nor unique is a valid legislative enactment even though it incidentally impacts upon First Amendment activities. Finally, that Court recognized the power of the legislature to enact taxes "in order to generate revenue so long as those laws operate evenhandedly upon all similarly situated." 237 Cal. Rptr. at 351. The *Times Mirror* Court specifically determined that its decision was consistent with *Minneapolis Star*, *Arkansas Writers' Project*, and *City of Alameda v. Premier Communications Network, Inc.*, 202 Cal. Rptr. 684 (Cal. App. 1984), all cases relied upon by Appellants.

There is a long and inherent tradition of a government hands-off with the press which has been held not to apply to broadcast or cable television. *Community Communications v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981). The government and cable broadcasters are tied in a way that the government and newspapers are not. The Court in *Community Communications* so held because of the great use of public property through right-of-way and public intrusion, which is not found in the newspaper business. The Arkansas Supreme Court in its opinion below found that payment of a franchise fee by cable companies in Arkansas satisfied the purchase of the use of those rights-of-way. That may be so, and that in fact is the very nature of the public franchise fee. However, that does not in any way lessen the distinction which is inherent in the press and cable television because of the disruption of public services and ways.

Cable television is not "similarly situated" when compared to any other medium. Its use of and impact upon public ways distinguishes it from all broadcast and print media, and its enjoyment of virtually unlimited access to households puts it in a different class than the print media. *Omega Satellite Products v. City of Indianapolis, Inc.*, 694 F.2d 119 (7th Cir. 1982). In *Omega Satellite Products*, the Court discussed different First Amendment treatment between television (either wireless or cable) and other media because of universal access resulting in a need to protect children. Appellants make light of this argument but it has been accepted by the Court and is readily understandable because of the pervasive influence of television in our present society. Television has become the electronic babysitter for the generations growing up in the '60s, '70s, '80s and now the '90s. While print publications may be subscribed to and brought into the home on a voluntary basis, once they are in the home they can be

secreted, or otherwise disposed of without being openly available to children if the parents so choose. However, television is of universal availability to anyone in the household with the ability to flip the switch. Other than certain lock-out features available in some communities for certain stations, there is no way to determine who or when or for what purpose a program is watched in the privacy of a home. The State obviously has an interest, to a certain extent, to regulate such a pervasive disseminator, and that power of regulation was recognized in *Omega Satellite Products*. This does not imply denial of access. In fact, access is open. It only implies regulation based on a differing level of protection because of universal access.

Cable television simply cannot be equated with any other entity for purposes of the "similarly situated" formula. It has a very real impact upon public ways and is of a character completely dissimilar to the press. Further, although the Appellees disagree with the finding of the Supreme Court of Arkansas that the service of descrambling satellite television signals is similarly situated to cable television service, the Arkansas General Assembly in enating Act 769 of 1989 corrected the only alleged defect found by the court to exist.

Both the Supreme Court of Oklahoma, in the case of *Oklahoma Broadcasters Association v. Oklahoma Tax Commission*, 789 P.2d 1312 (Okla. 1990), and the intermediate New York appellate court, in the case of *McGraw-Hill, Inc. v. State Tax Commission* (App. Div. 3 Sept., 1989), affirmed and adopted, 252 N.E.2d 163 (N.Y., 1990), in dismissing the important distinction between cable television and the other media, have gone too far in attempting to construe *Minneapolis Star* and other above-cited cases to read in favor of Appellants' position.

D. Arkansas Compensating Tax

Another portion of Appellants' First Amendment argument addresses the fact that Act 769 of 1989 did not amend the Arkansas Compensating Tax Act (cited by Appellants at Appendix F, page 26a of their Petition for Certiorari) to impose the tax on the service of descrambling satellite television signals. The Arkansas compensating (use) tax is levied on the privilege of storing, using, distributing, or consuming within the state any article of tangible personal property purchased for storage, use, distribution, or consumption in the state. The problem with this part of Appellants' argument is that the compensating tax, unlike the gross receipts (sales) tax, was not previously levied on the sale of cable television service. The very nature of the gross receipts tax makes it applicable only to transactions between a buyer and seller within the State of Arkansas. By definition, the compensating tax was and is not applicable to *any* service. Therefore, the Appellants' argument in this regard is without merit.

II.

Fourteenth Amendment Considerations

The Appellants have also alleged that Act 769 of 1989 violates their rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. (Joint App. P. 11) In *Streight v. Ragland*, 655 S.W.2d 459, it was determined by the Supreme Court of Arkansas that state tax legislation should be reviewed under the "rational basis" test. The parties who attacked the tax legislation in *Streight* urged the Arkansas Supreme Court to abandon the rational basis test. In refusing such position the Court held:

"Under the rationality standard of review, we must

presume the legislation is constitutional, i.e. that it is rationally related to achieving a legitimate governmental objective. This presumption we indulge locates the burden of proof. It imposes upon the party against whom it is directed the burden of proving the unconstitutionality of the legislation, i.e. that the act is not rationally related to achieving any legitimate objective of state government under any reasonably conceivable state of facts . . . All tax measures usually involve some discrimination, . . . but these discriminations are not constitutionally impermissible as long as they are not arbitrary and are supported by a rational and legitimate basis . . . It is simply impermissible for us to evaluate the wisdom of legislation." (655 S.W.2d at 463-465)

The same facts which render cable television completely dissimilar to all other media provide more than sufficient support for subjecting sales of cable television service to the general sales tax. Cable's use of public ways and disruption of public order place it in a different class for both First Amendment and equal protection considerations. As stated by the very cases upon which Appellants so heavily rely, *Minneapolis Star* and *Arkansas Writers' Project*, the governmental objective of raising revenue is important, indeed critical. An objective which is so described is obviously one which is legitimate. Therefore, the tax legislation at issue in the present case meets and surpasses the requirements of the rational basis test set forth in *Streight v. Ragland*.

No fundamental guarantee has been significantly diminished or curtailed by the tax legislation challenged by Appellants. As a result, equal protection analysis requires no more than the application of the rational basis standard. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 49 L.Ed.2d 520, 96 S.Ct. 2562 (1976); *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 36 L.Ed.2d 16, 93 S.Ct. 1278 (1973).

As held in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 3 L.Ed.2d 480, 79 S.Ct. 437 (1959):

> "The States have a very wide discretion in the laying of their taxes . . . The state may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government."
> (358 U.S. at 526, 527)

Allied Stores made it clear that tax legislation is presumed to be rationally related to a legitimate governmental objective. The great deference given to a legislature in its exercise of discretion as to the levying of taxes is justified because it is the legislature which must determine which taxes are economically sound in order to raise revenue. If the legislature determines that collection of a tax would be unreliable or burdensome to the government as applied to a particular transaction, it may choose to exempt that transaction in order to prevent economic waste. As stated by this Court in *Madden v. Kentucky*, 309 U.S. 83 (1940):

> "Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden."
> (309 U.S. at 88)

Imposition of the general sales tax upon sales of cable

television service does not significantly burden any rights of Appellants. Without significant diminishing or curtailment of a fundamental right, there can be no infringement of such right. *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, a case relied upon as authority by Appellants, acknowledged:

> ". . . rules restricting speech do not necessarily abridge freedom of speech . . . Restriction becomes abridgement only when government seeks to limit speech because it is on one side of the issue rather than another, . . . or because it is thought unwise, unfair, false, or dangerous." (567 F.2d at 46, 47)

No First Amendment protection having been infringed, Appellants cannot make some higher degree of scrutiny applicable to the present case. The presumption of rationality which attaches to all tax legislation cannot be overcome unless a challenger, such as Appellants herein, proves that no conceivable rational objective could support the legislation. *Streight v. Ragland*, 655 S.W.2d 459. Appellants have not and cannot meet that burden of proof, and no infringement of any fundamental right has been proven by Appellants.

CONCLUSION

For the foregoing reasons, the Appellees respectfully request that this Honorable Court affirm the decision of the Supreme Court of Arkansas with regard to Act 769 of 1989.

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